



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 29, 2022

IN THE MATTER OF:

Appeal Board No. 623547 A

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board No. 623546A, the Appeal Board on its motion pursuant to Labor Law § 534, has reopened and reconsidered Appeal Board No. 621941, filed April

8, 2022, which denied the claimant's appeal request as untimely and continued in effect the decision of the Administrative Law Judge which sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination holding the claimant ineligible to receive benefits, effective April 13, 2020 and until the reason for ineligibility no longer exists, on the basis that the claimant was not available for employment.

In Appeal Board No. 623547A, the Appeal Board on its motion pursuant to Labor Law § 534, has reopened and reconsidered Appeal Board No. 621942, filed April

8, 2022, which denied the claimant's appeal request as untimely and continued in effect the decision of the Administrative Law Judge which sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination charging the claimant with an overpayment of \$8,064.00 in benefits recoverable pursuant to Labor Law § 597 (4) and charging the

claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$8,400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

In Appeal Board No. 623548A, the Appeal Board on its motion pursuant to Labor Law § 534, has reopened and reconsidered Appeal Board No. 621943, filed April

8, 2022, which denied the claimant's appeal request as untimely and continued in effect the decision of the Administrative Law Judge which sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination reducing the claimant's right to receive future benefits by 64 effective days and charging a civil penalty of \$1,209.60 on the basis that the claimant made willful misrepresentations to obtain benefits.

Upon consideration of the entire record, the Board makes the following

**FINDINGS OF FACT:** The Department of Labor issued the initial determinations on January 25, 2021. The claimant received the determinations in either January or February 2021. The determinations had instructions that a hearing could be requested within 30 days of the date of mailing. The claimant did not request a hearing until she received a repayment notice in June 2021. The claimant's request to reopen was made on July 15, 2021.

The initial determination with respect to claimant's lack of availability was a continuing determination and was held effective beginning April 13, 2020, and thereafter. The determinations with respect to the overpayments, willful misrepresentations and the civil penalty, were effective for the period April 29, 2020, until October 7, 2020.

**OPINION:** Pursuant to Labor Law § 620 (1), a request for a hearing must be made

within thirty days of the mailing of the determination. The regulations of the Board, as amended, provide that a hearing request will be deemed to have been timely made if the request is postmarked within thirty days of the receipt of the determination. Absent any proof to the contrary, a determination shall be held to have been mailed on the date recited on the determination and received five business days after the mailing of the determination (12 NYCRR § 461.1). The latest date that the claimant could

request a hearing, on the issues of the overpayments, willful misrepresentation and the civil penalty, all of which had definite effective dates, would have been March 3, 2021. As the claimant's request was made on July 15, 2021, her request was untimely and the initial determinations in Appeal Board Nos. 623547A and 623548A, with respect to the overpayments, willful misrepresentation and civil penalty, are continued in effect.

However, in Appeal Board No. 623546A, the issue of availability is a

continuing determination and the claimant's hearing request is read back thirty days from the request date of July 15, 2021, and therefore timely as of June 15, 2021. The claimant is therefore entitled to a decision on the merits of the determination of her availability for the period beginning June 15, 2021, and up until the date of the hearing held on February 11, 2022.

Our review of the record, however, reveals that Appeal Board No. 623546A should be remanded to hold a hearing concerning the issue of availability for the period June 15, 2021, until February 11, 2022. The judge took no record as to whether the claimant was available for employment from June 15, 2021, until February 11, 2022. The judge shall inquire as to whether the claimant was authorized to work in the United States from June 15, 2021, until February 11, 2022.

DECISION: In Appeal Board Nos. 623546A, 623547A and 623548A, the decisions of the Board in Appeal Board Nos. 621941, 621942 and 621943, are rescinded.

In Appeal Board Nos. 623547A and 623548A, the decisions of the Administrative Law Judge, are affirmed.

In Appeal Board Nos. 623547A and 623548A, the Commissioner of Labor's timeliness objection is sustained and the initial determinations charging the claimant with an overpayment of \$8,064.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an overpayment of Federal

Pandemic Unemployment Compensation of \$8,400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 64 effective days and charging a civil penalty of \$1,209.60 on the basis that the claimant made willful misrepresentations to obtain benefits, are continued in effect.

In Appeal Board No. 623546A, the decision of the Administrative Law Judge, insofar as it sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination holding the claimant ineligible to receive benefits, effective as modified, beginning April 13, 2020, through June 14, 2021, on the basis that the claimant was not available for employment, is affirmed.

In Appeal Board No. 623546A, the Commissioner of Labor's timeliness objection

for the period beginning April 13, 2020, through June 14, 2021, is sustained, and the initial determination holding the claimant ineligible to receive benefits, as modified to be effective beginning April 13, 2020, through June 14, 2021, on the basis that the claimant was not available for employment, is continued in effect.

In Appeal Board No.623546A, the decision of the Administrative Law Judge, insofar as it sustained the Commissioner of Labor's timeliness objection which continued in effect the initial determination holding the claimant ineligible to receive benefits, effective as modified, beginning June 15, 2021, through February 12, 2022, on the basis that the claimant was not available for employment, is reversed.

In Appeal Board No. 623546A, the Commissioner of Labor's timeliness objection, insofar as effective beginning June 15, 2021, through February 12, 2022, is overruled.

In Appeal Board No.623546A, the decision of the Administrative Law Judge, insofar as it continued in effect the initial determination holding the claimant ineligible to receive benefits, as modified to be effective beginning June 15, 2021, through February 11, 2022, on the basis that the claimant was not available for employment, is rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of claimant's availability for the period from June 15, 2021, until February 11, 2022, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issue of availability for the period from June 15, 2021, until February 11, 2022, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the

remanded issue s only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER